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On February 28, 1980, Lynette West, a 20-year-old California student, collapsed on her bathroom floor and was rushed to the hospital. Her doctors were puzzled at the time, but some months later, after reading reports from the Center for Disease Control, they concluded that she had suffered from the menstrually related toxic shock syndrome.

Miss West, who was using a vaginal tampon manufactured by Johnson and Johnson Products, Inc. at the time of her illness, sued the company for compensatory and punitive damages. In the subsequent jury trial, Johnson & Johnson’s experts argued that Miss West had actually contracted streptococcal scarlet fever, which causes symptoms like those of toxic shock syndrome. The jury sided with the plaintiff on that point. During the trial, however, it was shown that the Center for Disease Control had not established a close association between toxic shock syndrome and tampon use until May or June of 1980, some months after Miss West had been discharged from the hospital.

The plaintiff’s counsel argued that the tampon was a defective product. Applying the “consumer expectation test,” he asserted that an average consumer would not expect to “get sick from the product.” The jury agreed and awarded Miss West large sums of money. There was further litigation, and the final outcome of the case is not known to the public. West v. Johnson and Johnson may not be a typical case, but it illustrates a number of characteristics of American tort law today.

The jury in this case, as in nearly every medical malpractice and product design trial, was called upon to resolve a dispute between sophisticated witnesses whose scientific credibility the jurors were not qualified to appraise. Other examples of scientific questions addressed by tort law include the issues of whether Agent Orange-injured soldiers in Vietnam and whether the risk of AIDS infection can be eliminated from blood transfusions.

Tort law, with all its faults, might be beneficial if it promoted socially desirable behavior. There is reason to believe, however, that the fear of liability is not a strong deterrent in cases involving ignorance, incompetence, and greed. Moreover, the negative effects of tort law on behavior may outweigh the positive. Many skilled physicians discontinue their obstetrical practice because of the threat of liability, and manufacturing firms abandon useful research for the same reason.

If tort law fails as a behavior-control mechanism, is it justified as a mechanism for compensating accident victims? On this score, the system is grossly inefficient. A starting proportion of the money paid for liability insurance premiums goes for costs of litigation, marketing expenses, and insurer profits. As far as the injured party is concerned, the system resembles a lottery in which he may become an instant millionaire or go away empty handed.

In their search for alternatives to the present system, planners have turned to the “no-fault” principle. Virginia has recently eliminated malpractice claims in birth injury cases and substituted a birth-related neurological injury compensation plan, funded primarily by obstetricians and the hospitals where babies are delivered. The plan provides generous compensation without requiring proof of physician negligence, but the child is deprived of the chance to win the bonanza level of “pain and suffering” damages that might come with a successful tort suit.

The present author suggests that the states adopt, as a preliminary measure, two reforms: First, the less serious personal injury cases could be taken out of the tort system, and medical care and wage replacement needs could be met through mandatory employee benefits and an improved medicaid system. Second, the seriously injured cases could remain in the tort system, but with new rules. Successful plaintiffs would have their legal fees paid by the defendants. They would be compensated only for those economic losses not already covered by health insurance, routine employee benefits, and basic social insurance plans. Furthermore, pain and suffering awards would be subject to a ceiling of about $150,000.

These reforms would not keep all scientific disputes out of the courtroom, but they would treat those who now use the tort system in a manner more appropriate to modern conditions. In today’s world, the real choice is which insurers are to provide what level of compensation to accident victims of all sorts. Under the present laws, compensation has often been inconsistent and unrealistic.
(As this article illustrates, the product liability and medical malpractice system for settlement has gotten completely out of hand. Medical practice is better now than 30 or 40 years ago, fewer people die from medical illnesses and surgery than in the past, and complications of treatment are less frequent; but more doctors, hospitals, and drug firms are now being sued. When I started practice in obstetrics and gynecology, my professional liability insurance for $10,000.00 coverage was $48.00 a year. Everyone in the practice of obstetrics and gynecology now is familiar with $50,000 to $100,000 annual liability insurance premiums.

The title of this report suggests a partial solution to the malpractice problem and that is to leave the decision of negligence or nonnegligence to a panel of experts instead of a jury or laymen. I have watched attorneys choose a jury. They do their best in malpractice cases to find jurors who are most unlikely to understand the scientific nuances of a case. Also, the advocacy system, so dear to attorneys, seems highly unethical to me. I have heard them make outrageous statements to the jury and court in opening and closing remarks. Statements that have no basis in fact are made to influence the jury. One would think that disputes about medical care could be discussed in a forum like a clinical pathological conference where facts and opinions are aired and a conclusion reached.

Another pernicious practice in our present tort system is the expert witness, highly paid and willing to travel. Such a witness should be paid no more than jurors are paid. That would stop their activities and reduce costs. The expert witness fees and the contingency fees for attorneys feed the unpleasant aspects of medical practice. Most legal actions brought against physicians are for bad results, not for malpractice. There is a difference between maloccurrence and malpractice, but many patients, attorneys, and courts do not recognize the difference. Liability insurance should not cover complications that are to be expected as part of the practice of medicine.—Ed.)